Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

BERNARD O'NEILL, *et al.*,

Petitioners,

v.

CITY OF PHILADELPHIA, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal Rule of Civil Procedure 15(a) provides in pertinent part that "a party may amend its pleading only with the opposing party's written consent or the court's leave' and that "[t]he court should freely give leave when justice so requires." The questions presented are:

1. Does F. R. Civ. P. 15(a) give a district court judge discretion to deny a motion to amend a complaint that is filed before the statute of limitations has run and approximately nine years before the case was scheduled to go to trial?

2. Are defendants prejudiced within the meaning of this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962), where they had notice that they were going to be added as defendants approximately nine years before the case went to trial?

STATEMENT OF THE PARTIES TO THE PROCEEDINGS

Petitioner states, pursuant to Rule 14.1(b), that in addition to Bernard O'Neill, plaintiffs/petitioners in the court below included:

Linda A. O'Neill; Michael Coyle, a minor by and through his parent and natural guardian, Linda O'Neill; Kelly Coyle, a minor by and through her parent and natural guardian, Linda O'Neill; Delores Carmichael; Kathleen O'Neill; Kevin Williams, a minor by and through his parent and natural guardian, Linda O'Neill; D, Kelly O'Neill; Chad G. Brumbaugh.

In addition to the City of Philadelphia, the individual defendants are:

Police Commissioner Richard Neal; Detective Robert Ballentine; Detective Richard Bova; Detective Robison; Detective John Doe; Captain John Doe; Lieutenant Robert Morris; Lieutenant John Doe; Sergeant John Doe; Police Officers John Doe Nos. 1 through 50.

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OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (App. 2a-12a) is unpublished but can be found at 2008 U.S. App. LEXIS 16654. The Memorandum and Order of the district court denying Plaintiff's Motion to Amend the Complaint is unpublished, and attached hereto at App. 36a-38a; the Memorandum and Order of the district court denying Defendants' Motion for Summary Judgment as to Detectives Robison and Ballentine is unpublished, and attached hereto at App. 19a-35a; the Memorandum and Order of the district court granting Detectives Robison's and Ballentine's Motion for Reconsideration is unpublished, and attached hereto at App. 36a-38a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on August 4, 2008 (App. 2a-12a). The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Civil Procedure 15(a) provides

> "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within 20 days

> after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; leave shall be freely given when justice so requires."

F. R. Civ. P. 15(a).

STATEMENT OF THE CASE

The Plaintiffs (Petitioners) filed a civil complaint on March 25, 1997 pursuant to 42 U.S.C. § 1983 alleging Fourth Amendment claims of illegal entry/illegal search and excessive force. Plaintiffs' Complaint was filed against Defendants City of Philadelphia, Commissioner Richard Neal, Detective Robert Ballentine, Detective Richard Bova, Detective Robison, Lieutenant Robert Morris and a Lieutenant John Doe, Sergeant John Doe and Police Officers John Doe #1-50.

The allegations in Plaintiffs' Complaint stemmed from three separate entries/searches of Plaintiff, Bernard O'Neill's residence at 2910 S. 61st Street in Philadelphia, Pennsylvania. Defendants (Respondents) had an arrest warrant for Jason O'Neill, Plaintiff Bernard O'Neill's stepson, who was wanted for three counts of murder by arson. The first two entries/searches of Bernard O'Neill's residence occurred on May 30, 1995 and June 12, 1995 and were conducted by named Defendants Detectives Ballentine and Robison along with uniformed officers from the 12th District and Federal Fugitive Task Force Agent Steve Shute. The November 23, 1995 entry/search occurred on Thanksgiving morning and did not involve any of the named Defendants, but

instead was executed by Detectives Permint and Quick, and involved uniformed members of the Stakeout Unit and the 12th District. It was the November 23, 1995 entry/search that involved the use of excessive force and prompted the Plaintiffs' to file an Internal Affairs complaint.

At the time of filing the Federal Complaint, Plaintiffs did not know the identities of the persons who had conducted the November 23, 1995 entry/search and accordingly listed a number of John Doe Defendants. On May 22, 1997, Defendants served Plaintiffs with Initial Disclosures, specifically identifying the Officers involved in the November incident. Plaintiffs filed a Motion to Amend the Complaint on July 25, 1997 to add as Defendants those Officers identified in the Defendants' Initial Disclosures as participating in the November 23, 1995 entry/search. Plaintiffs' Motion to Amend was filed before the Statute of Limitations had run on Plaintiffs' § 1983 claim against the newly named Defendants.

By Order dated August 8, 1997, the case was placed in civil suspense by the district court pending the resolution of the criminal proceedings against Jason O'Neill, who had been arrested in Florida. Before the Defendants could file a Response to Plaintiffs' Motion for Leave to Amend the Complaint, by Order dated August 12, 1997, Plaintiffs' Motion to Amend was "DENIED without prejudice to its renewal by letter application to the Court once the case is removed from suspense."

The case was removed from Civil Suspense on December 3, 2001. Settlement negotiations ensued, and a settlement agreement was reached. Accordingly, on March 17, 2003, pursuant to Local Rule 41.1(b), an Order was issued dismissing the action with prejudice. As part of the settlement, Defendants had agreed to return to the Plaintiffs certain personal items taken from Bernard O'Neill's residence, including a family Bible. Because the Defendants failed to comply with this aspect of the agreement, on June 16, 2003, the Court issued an Order allowing the Plaintiffs to inspect the personal belongings in the possession of the District Attorney's office and to identify what items were missing.

After the ordered inspection, by Order dated June 25, 2003, the case was reopened for the limited purpose of allowing the parties to resolve the dispute regarding the missing personal property and to finalize the settlement. The parties attempted to resolve the dispute and settle the matter, and towards that end, on November 9, 2004, the Court issued an Order to the Clerk of Quarter Sessions of Philadelphia County, requiring the Clerk to turn over to Bernard O'Neill the missing items.

Subsequent to the November 9, 2004 Order, the missing items were not turned over and accordingly the settlement agreement fell apart. By Order dated August 10, 2006, the Court sent notice that the case would be dismissed unless written application was submitted within thirty days. Plaintiffs' counsel submitted the required written application and shortly thereafter, on November 6, 2006, sent a letter to the Court renewing the Motion for Leave to Amend the Complaint. On the

same day, Defendants filed a Motion for Summary Judgment. Two days later, Defendants filed a Response to Plaintiffs' Motion for Leave to Amend the Complaint. Without giving the Plaintiffs a chance to Reply to Defendants' Response, by order dated November 15, 2006, the Court denied the Plaintiffs' Motion for Leave to Amend the Complaint to add the Officers involved in the November 23, 1995 incident. In denying the Motion, the Court held that it would work a substantial hardship on the Defendants. App. 37a.

On November 22, 2006, Plaintiff filed a Response to Defendants' Motion for Summary Judgment. By Order dated December 12, 2006, the Court granted Defendants' Motion as to Detective Bova because he had not participated in any of the entries/searches, and the City of Philadelphia, Commissioner Neal and Lieutenant Morris, and denied Defendants' Motion as to Defendants Ballentine and Robison regarding the Plaintiffs' illegal entry/search claims for the May and June 1995 incidents. In reaching its conclusion, the Court held that Defendants' Ballentine and Robison were not entitled to qualified immunity because "there [were] genuine issues of material fact as to whether Detectives Ballentine and Robison had a reasonable belief that Jason lived at 2910 S. 61st Street and whether Jason could be found at 2910 S. 61st Street on the days of the searches." App. 30a.

Defendants filed a Motion for Reconsideration on December 22, 2006. Without giving Plaintiffs the required fourteen days to Respond, by Order issued on January 4, 2007, the Court granted the Defendants' Motion for Reconsideration and dismissed the case.

Reviewing the same evidence that had been presented on Summary Judgment, the Court held that "[b]ased on [the] undisputed facts, I find that defendants Ballentine and Robison acted objectively reasonably when they searched Bernard O'Neill's house." App. 15a.

On January 15, 2007, Plaintiffs filed a Motion for Reconsideration or in the Alternative a Rule 60(b) Motion for Relief from Judgment. By Order dated January 16, 2007, the Court denied Plaintiffs' Motion and Plaintiffs filed a timely appeal to the Third Circuit Court of Appeals. In an unpublished decision, the Third Circuit affirmed the district court. On the issue of amending the complaint, the Third Circuit held that the district court did not abuse its discretion in denying the amendment because the delay in renewing the motion to amend prejudiced the defendants. App. 7a.

REASONS FOR GRANTING THE PETITION

This Court has written sparingly on Federal Rule of Civil Procedure 15(a). *See Foman v. Davis*, 371 U.S. 178 (1962). In *Foman*, this Court held that pursuant to Rule 15(a),

> "[i]n the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be 'freely given'."

Foman, 371 U.S. at 182. This Court's decision in *Foman* limits the district courts discretion to deny amendment to those circumstances where there is undue prejudice, delay or bad faith. *Id.* However, while this Court has articulated the proper standard to be employed by the lower courts in exercising their discretion, it has not addressed the circumstances constituting undue prejudice, delay or bad faith. This case raises two related issues that would permit this Court to clarify the meaning of the aforementioned terms, and their application in this case. First, pursuant to Rule 15(a) and this Court's decision in *Foman*, did the district court have the discretion to deny the Plaintiffs' Motion to Amend where it was filed before the statute of limitations had run and well before discovery had ended and the case was slated for trial.

Secondly, could the newly added defendants have been prejudiced, as the Third Circuit held, by the amendment where the Motion identifying them as defendants was filed approximately nine years before the case was scheduled for trial and hence they were on notice well before trial that they were potential defendants and the nature of the Plaintiffs claims against them. On this second issue, there is a conflict among the circuit courts of appeal that warrant this Court granting the Plaintiffs' Petition for Writ of Certiorari. The majority of the circuit court's that have addressed the issue have held that a delay in filing the motion to amend is insufficient to deny the right to amend absent a demonstration by the non-moving party of prejudice or bad faith. *Cornell & Co., Inc. v. Occupational Safety and Health Review Com.*, 573 F.2d 820, 823-24 (3d Cir.1978); *see also, Laber v. Harvey*, 438 F.3d 404, 426-

29 (4th Cir. 2006); *Harrison v. Rubin*, 174 F.3d 249, 252-53 (D.C. Cir. 1999); *Bell v. Allstate Life Ins. Co.*, 160 F.3d 452, 454 (8th Cir. 1998); *Security Ins. Co. of Hartford v. Kevin Tucker & Assoc., Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995); *Rachman Bag Co. v. Liberty Mut. Ins. Co.*, 46 F.3d 230, 234-35 (2d Cir. 1995); *United States v. Pend Orielle Pub. Util. Dist. No. 1*, 926 F.2d 1502, 1511 (9th Cir. 1991). Other circuits focus on the length of the delay in filing the motion to amend, and if the delay is substantial, shift the burden to the moving party to justify the delay. *Hayes v. New England Millwork Distribs., Inc.*, 602 F.2d 15, 19-20 (1st Cir. 1979); *Andrx Pharms. Inc. v. Elan Corp.*, 421 F.3d 1227, 1237 (11th Cir. 2005). In a similar vein, the Tenth Circuit focuses primarily on the reasons given for the delay. *Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1205-1206 (10th Cir. 2006).

I. The district court did not have the discretion to deny the amendments to the complaint.

It is generally understood that a district court has discretion to grant or deny a motion to amend a pleading. *Foman*, 371 U.S. at 182. However, in the context of Rule 15(a), this discretion is circumscribed, and limited, by the Rules liberal amendment policy and the well-established principle that cases should be decided on the merits and not dismissed because of technicalities. *Foman*, 371 U.S. at 181-82; *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938-39 (3d Cir. 1984). As the Third Circuit has recognized, in light of this Court's decision in *Foman*, Rule 15(a) creates a presumption in favor of amending, and it is the opposing

parties burden to demonstrate that the amendment would work a prejudice. *Boileau*, 730 F.2d at 938. Accordingly, absent a showing of bad faith or prejudice, under the Third Circuits reading of *Foman*, a district court does not have discretion to deny a motion to amend.

In this case, both the district court and the Third Circuit Court of Appeals focused on the date that Plaintiffs' counsel sent the court a letter requesting that the Motion to Amend the Complaint be renewed, as opposed to the date the Motion to Amend was actually filed, to determine whether the defendants were prejudiced. App. 7a, 37a. It is Petitioners' position that under the circumstances of this case, the lower courts erred in focusing on the date the Motion was renewed versus the date it was filed in analyzing the amendment issue, and that, when viewed from the date the Motion was filed, which was July 25, 1997, the district court did not have discretion to deny the Motion as there was no bad faith or prejudice.

At the outset, it should be noted that the district court's denial on November 15, 2006 of the Motion to Amend the Complaint precluded the Plaintiffs from proceeding on their best claim, which involved the November 23, 1995 search of the Plaintiffs' residence by a SWAT team. In this case, the Petitioners learned the identities of the officers involved in November 23, 1995 search through the defendants Rule 26 disclosures and shortly thereafter filed a Motion to Amend the Complaint to add those individuals as defendants. The Motion to Amend the Complaint was filed on July 25, 1997, well before the statute of limitations ran as to those

newly named officers, and well before the end of discovery. In short, the Petitioners complied with all of the Rules and took every step necessary to ensure that the Complaint would be amended and the officers involved in the November 23, 1995 incident added as defendants. Under these circumstances, the newly named defendants were given adequate notice in 1997 that they were being added to the lawsuit and the nature of the Plaintiffs' claims against them.

However, as detailed above, due to no fault of the Petitioners, the district court did not rule on the Motion to Amend the Complaint and instead put the case in civil suspense. The case was lifted from civil suspense on December 3, 2001, and serious settlement negotiations ensued. A settlement agreement was reached, and on March 17, 2003 an order was issued dismissing the case. Again, through no fault of Petitioners', the defendants were unable to comply with one of the terms of the settlement agreement—the return of Bernard O'Neill's family bible, and the district court issued a number of orders in an effort to compel compliance with the settlement agreement (the last order was November 9, 2004). During this period of time, the Petitioners were under the impression that they had an enforceable settlement agreement.

It wasn't until August 10, 2006, when the district court issued an order to Plaintiff requiring that the case move forward, that the Petitioners shifted gears from settlement mode to litigation mode. Following the jump-starting of the case, Petitioners sent the district court a letter renewing the Motion to Amend the Complaint. In light of the above circumstance, this is clearly not a

case where the plaintiffs delayed in filing a motion to amend the complaint. Indeed, the Petitioners filed the Motion to Amend shortly after receiving the Rule 26 disclosures identifying the officers involved in the November 23, 1995 incident. Nor is this a case where the newly named defendants were caught off guard, or not alerted to the fact that they were going to be named as defendants until late in the proceedings. By filing the Motion to Amend in 1997, the Petitioners put the newly named defendants on notice well before the end of discovery, and some nine years before any scheduled trial date, that they were being sued and the nature of Plaintiffs' claims against them.

Notwithstanding the fact that the Motion to Amend was filed in 1997, the Third Circuit analyzed the issue of prejudice as if the Motion had been filed in 2006, when the letter to renew the Motion was sent. Contrary to the Third Circuit's approach, under the circumstances of this case, the issue of prejudice should have been analyzed from the date the Petitioners filed the Motion to Amend and not the date the letter to renew the Motion was sent. Using the date the Petitioners actually filed the Motion to Amend, it is clear that in 1997 there was no prejudice or bad faith associated with the filing of the Motion. Accordingly, under this Court's decision in *Foman*, the district court would not have had discretion to deny the Petitioners Motion to Amend and committed and error in doing so.

2. There was no prejudice to the newly named defendants.

The Third Circuit denied the Petitioners' Motion to Amend the Complaint to replace the John Doe defendants with named individuals on the ground that the delay in filing the letter to renew the Motion caused prejudice to defendants. App. 7a. This Court has not defined the meaning of prejudice in the *Foman* standard. Moreover, as stated above, there is a conflict in the circuit courts as to what role delay plays in establishing prejudice under the *Foman* standard. Notwithstanding this conflict, the majority of the circuit courts, including the Third Circuit, have held that delay in filing the Motion to Amend is not sufficient, by itself, to constitute prejudice. (see cites above).

Instead, in order to establish prejudice, the non-moving party has the burden of demonstrating that the amendment to the pleading "would result in additional discovery, cost, and preparation to defend against new facts and new theories." *Cureton v. National Collegiate Athletic Ass'n.*, 252 F.3d 267, 273 (3d Cir. 2001); *Minter*, 451 F.3d at 1208 ("Courts typically find prejudice only when the amendment unfairly affects the defendants 'in terms of preparing their defense to the amendment.'"). In light of these concerns, the courts have recognized that "notice strongly mitigates against any claims of prejudice." *Wausau Underwriters Ins., Co.v. Shesler*, 190 F.R.D. 341 (E.D. Pa. 1999).

In the instant case, the newly named defendants had notice in 1997 that they were being sued and the nature of the claims against them. Petitioners' Complaint, and

proposed Amended Complaint, included as one of its causes of action the November 23, 1995 incident that the newly named defendants participated in. Moreover, prior to Petitioners filing the Complaint, the newly named defendants had been the subject of an internal affairs investigation regarding the November 23, 1995 incident, and also were listed on defendants Rule 26 disclosures as persons with knowledge of the incident.

Under these circumstances, adding the newly named defendants would not have required additional discovery, costs, or a change in legal strategy, as the Third Circuit suggested, because the factual allegations regarding the newly added defendants were contained in the original Complaint as well as the proposed Amended Complaint. All the Petitioners were seeking to do was replace the John Doe defendants in the original Complaint with named defendants.

Nor would the amendment have delayed the trial. Contrary to the Third Circuits suggestion, the case was not going to trial the day after the letter to renew the Motion to Amend was filed with the district court. The day after the Petitioners filed the letter to renew the Motion to Amend, the defendants filed a Motion for Summary Judgment. The district court was therefore required to resolve defendants' Motion before scheduling trial.

Accordingly, under this Court's decision in *Foman*, and the liberal amendment policy of Rule 15(a), defendants failed to demonstrate that they were prejudiced by Petitioners renewal of the Motion to Amend the Complaint and the Third Circuit erred in so holding.

CONCLUSION

For the above stated reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED AUGUST 4, 2008

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 07-1322

BERNARD J. O'NEILL; LINDA A. O'NEILL; MICHAEL COYLE, a minor, by and through his parent and natural guardian, Linda A. O'Neill; KELLY COYLE, a minor, by and through her parent and natural guardian, Linda A. O'Neill; DELORES CARMICHAEL; KATHLEEN O'NEILL; KEVIN WILLIAMS, a minor, by and through his parent and natural guardian, Linda A. O'Neill; D. KELLY O'NEILL; CHAD G. BRUMBAUGH,

Appellants,

v.

CITY OF PHILADELPHIA; POLICE COMMISSIONER RICHARD NEAL; DETECTIVE ROBERT BALLENTINE; DETECTIVE RICHARD BOVA; DETECTIVE ROBINSON; DETECTIVE JOHN DOE; CAPTAIN JOHN DOE; LIEUTENANT ROBERT MORRIS; LIEUTENANT JOHN DOE; SERGEANT JOHN DOE; POLICE OFFICERS JOHN DOE NOS. 1 THROUGH 50.

Appendix A

On Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. No. 97-cv-02141)
District Judge: Hon. Thomas N. O'Neill, Jr.

Submitted under Third Circuit LAR 34.1(a)
on April 11, 2008.

Before SMITH, HARDIMAN and ROTH,
Circuit Judges.

(Opinion Filed Aug. 4, 2008)

OPINION

ROTH, Circuit Judge:

Bernard O'Neill, together with other named plaintiffs, appeals the District Court's order denying plaintiffs' motion for leave to amend the complaint, its order granting the defendants' motion for reconsideration with respect to summary judgment, and its order denying plaintiffs' motion for reconsideration. For the reasons discussed below, we will affirm.

I. *Background and Procedural History*

As the facts are well known to the parties, we will discuss them only briefly here.

On March 25, 1997, plaintiffs filed this lawsuit in the U.S. District Court for the Eastern District of

Pennsylvania. The defendants were the City of Philadelphia, multiple named police officers, including Detectives Robert Ballentine, Jr. and Gerald Robinson, and multiple "John Doe" police officers. Plaintiffs alleged that defendants violated their constitutional rights and state law during three searches of O'Neill's home at 2910 S. 61st Street, Philadelphia, Pennsylvania, on May 30, June 12, and November 23, 1995.

These searches were conducted pursuant to an arrest warrant for O'Neill's stepson. The April 1995 affidavit of probable cause for the warrant, prepared by Detective Richard Bova, indicates that O'Neill's stepson was suspected of a March 26, 1995, arson and had fled to Florida. The Activity Sheet for the May 30 search stated, however, that "Detectives have received information that the fugitive was in the area." The Activity Sheet for the June 12 search states, "Detectives prpceeded [*sic*] to 2910 S 61st Street to search for the fugitive as a result of information received from Police Recruit Darden."

On July 25, 1997, Plaintiffs moved to amend the complaint by substituting names for the "John Doe" officers. On August 7, 1997, the case was stayed and placed in the civil suspense file, pending the resolution of criminal proceedings against O'Neill's stepson. The District Court denied the motion to amend, without prejudice to its renewal when the case was removed from suspense. On December 3, 2001, the case was removed from suspense. The case was then closed by a settlement agreement on March 17, 2003. The agreement failed,

however, and the case was reopened on June 25, 2003. Trial was scheduled to begin on November 7, 2006. The day before, November 6, plaintiffs sent the District Court a letter renewing their motion to amend.

The District Court denied the motion. The court reasoned that allowing the amendment would result in "substantial hardship" to defendants. Noting that plaintiffs had "nearly five years to amend their complaint after the case was removed from civil suspense and before the trial was scheduled," the District Court concluded that "[a]t this late hour, allowing the amendment will result in not only the addition of multiple defendants and further delay of resolution of the case, but may necessitate a complete change in trial strategy for the current defendants."

On December 12, 2006, the District Court granted defendants' motion to dismiss and entered summary judgment in favor of defendants on all claims except the Fourth Amendment illegal search claims against Detectives Ballentine and Robison.[1] The District Court found that there were genuine issues of material fact as to whether those detectives "had a reasonable belief" that Jason lived and could be found at 2910 S. 61 st Street. The District Court noted that, although the warrant listed 2910 S. 61st Street as the suspect's address and the police had information that the suspect

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1. Defendants Ballentine and Robison participated only in the May and July 1995 searches, not the November 1995 search.

was in the area, the affidavit supporting the warrant indicated that the suspect's last known whereabouts were in Florida. In addition, plaintiff O'Neill had told Internal Affairs that the suspect had not lived at 2910 S. 61st Street for three years, the police activity sheet described the address as "the fugitive's father's residence," and the suspect had not been found during the May search.

Defendants filed a motion for reconsideration, which the District Court granted on January 3, 2007. The District Court found that it was undisputed that Detectives Ballentine and Robison acted on a facially valid arrest warrant and that the activity sheets and warrant service forms for both the May and June searches indicate that the detectives had reports that the suspect was in the area. The District Court found further that plaintiffs offered no evidence that Ballentine and Robison had fabricated any information regarding the suspect's whereabouts. The District Court concluded that Ballentine and Robison were entitled to qualified immunity because they had acted "objectively reasonably" in searching 2910 S. 61st Street and entered summary judgment in their favor. Plaintiffs moved for reconsideration, but the District Court denied their motion.

Plaintiffs appealed. Their appeal presents two issues: (1) whether the District Court abused its discretion in denying their motion to amend, and (2) whether the District Court erred in granting the

defendants' motion for reconsideration and entering summary judgment in favor of defendants Ballentine and Robinson.[2]

II. *Analysis*

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have jurisdiction under 28 U.S.C. § 1291.

We review the District Court's decision to deny the Plaintiffs' motion for leave to amend their complaint for abuse of discretion. *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1413 (3d Cir.1993). Under Federal Rule of Civil Procedure 15, a party may amend a complaint after a response has been served "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The Supreme Court has explained,

> "In the absence of any apparent or declared reason-such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments

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2. Plaintiffs' Notice of Appeal indicates that they also sought to appeal the District Court's December 12, 2006, grant of summary judgment in favor of all other defendants. However, they have not briefed those issues on appeal, and we consider them waived.

> previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.-the leave sought should, as the rules require, be 'freely given.' "

Foman v. Davis, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). "It is well-settled that prejudice to the nonmoving party is the touchstone for the denial of an amendment." *Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir.1978). Although "[t]he passage of time, without more, does not require that a motion to amend a complaint be denied," at some point, the delay will become "undue" or "prejudicial." *Adams v. Gould*, 739 F.2d 858, 868 (3d Cir.1984). "Though leave to amend a complaint should be freely granted in the interests of justice, a motion to amend is committed to the sound discretion of the district judge." *Gay v. Petsock*, 917 F.2d 768, 772 (3d Cir.1990) (internal citation omitted).

We find no abuse of discretion in the District Court's denial of plaintiffs' motion to amend their complaint. The plaintiffs were aware of the information that they wished to substitute in their amended complaint in July 1997, when the District Court dismissed their motion without prejudice and specifically indicated that they could renew the motion once the case was no longer suspended. However, plaintiffs waited to renew their motion for over three years from the time that the case was reopened a second time. Plaintiffs argue that they did not renew their motion because the parties were

working on a settlement. However, this does not explain why they did not file their motion until the day before trial. *See Gay*, 917 F.2d at 772. We agree with the District Court that allowing the amendment would have prejudiced defendants. In particular, it appears that those defendants who had been named as of the day before trial had not participated in the November search. Adding such individuals to the case would likely have required Defendants to reexamine their trial strategy just one day before the trial was to begin. On this record, we find no abuse of discretion.

We exercise plenary review over the District Court's grant of summary judgment in favor of Ballentine and Robison. *Couden v. Duffy*, 446 F.3d 483, 491 n. 3 (3d Cir.2006). Summary judgment is appropriate only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hugh v. Butler County Family YMCA*, 418 F.3d 265, 266 (3d Cir.2005); Fed. R. Civ. Proc. 56. In reviewing the grant of summary judgment, we must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in that party's favor. *Hugh*, 418 F.3d at 267. We generally review a grant or denial of a motion for reconsideration for abuse of discretion; however, if "the underlying judgment was based in part upon the interpretation and application of a legal precept, our review is plenary." *United States v. Herrold*, 962 F.2d 1131, 1136 (3d Cir.1992).

"Qualified immunity operates . . . to ensure that before they are subjected to suit, officers are on notice

their conduct is unlawful." *Saucier v. Katz*, 533 U.S. 194, 206, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). "In considering whether qualified immunity applies, a court must first decide whether the facts, taken in the light most favorable to the plaintiff, demonstrate a constitutional violation. . . . If so, the court next determines whether the constitutional right in question was clearly established." *Couden*, 446 F.3d at 492 (internal citations omitted). " 'The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.' " *Id.* (quoting *Saucier*, 533 U.S. at 202). An officer is entitled to qualified immunity if his mistake about what the law requires is reasonable. *Couden*, 446 F.3d at 492 (quoting *Saucier*, 533 U.S. at 205).

The key inquiry in granting Ballentine and Robison summary judgment, then, is whether they violated plaintiffs' constitutional rights in executing the May and June 1995 searches and, if so, whether it would have been clear to a reasonable officer that their conduct was unlawful. Those searches were conducted pursuant to an arrest warrant for O'Neill's twenty-year-old stepson, who was a fugitive.

The Supreme Court has held that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). We have held

that " *Payton* requires that officers have a reasonable belief the arrestee (1) lived in the residence, and (2) is within the residence at the time of entry." *United States v. Veal*, 453 F.3d 164, 167 (3d Cir.2006) (internal quotation omitted). "To determine whether the police had probable cause to believe a suspect was residing and present in a home, we apply a common sense approach and consider the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality." *Id.* at 167-68 (internal quotations omitted).

Viewing the facts in this case in the light most favorable to plaintiffs, we conclude that Ballentine and Robison had probable cause to believe that O'Neill's fugitive stepson was residing and present in 2910 S. 61st Street on May 30 and June 12, 1995, and therefore that the District Court properly determined that they were entitled to qualified immunity. It is undisputed that the arrest warrant listed 2910 S. 61st Street as the suspect's address. As such, it was reasonable for Ballentine and Robison to believe that the suspect resided at that address.[3] It is also undisputed that the May 30 and June 12 searches were carried out early in the morning and pursuant to information that the suspect was in the area. Accordingly, it was reasonable for Ballentine and Robison to believe that the suspect was in the residence at the time the searches were executed.

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3. Ballentine and Robison did not prepare either the warrant or the affidavit of probable cause. It is not clear that they would have had a reason to doubt the warrant's listing of the 2910 S. 61st Street address for the suspect.

Appendix A

Plaintiffs fault the District Court for overlooking facts that they characterize as favorable to them, noting the facts cited by the District Court when it initially denied Ballentine and Robison summary judgment. However, these facts do not alter the reasonableness of Ballentine and Robison's belief. As noted above, the May and June searches were conducted pursuant to a warrant identifying 2910 S. 61st Street as the suspect's address, based on information that the suspect was in the area (as opposed to Florida), and O'Neill did not inform the police about the suspect's more recent addresses until after the November 2005 search.

In addition, while the activity sheets state only that the suspect was in "the area," not specifically at 2910 S. 61st Street, and describe the residence as the suspect's father's, the suspect was only twenty years old at the time. As defendants were not aware of other addresses for the suspect in May and June 1995, they could have reasonably believed that a twenty-year-old would be staying with his father if he was in the area. Although the suspect was not in the residence at the May search, given that he was a fugitive and that new information again suggested he was in the area, the officers could have reasonably believed that he would be at 2910 S. 61 st Street during the June search.

Because undisputed facts establish that Ballentine and Robison reasonably believed that the suspect resided and was present at 2910 S. 61 st Street on May 30 and June 12, 1995, the District Court properly granted Defendants' motion for reconsideration and

entered summary judgment in their favor. For the same reasons, the District Court did not abuse its discretion in denying plaintiffs' subsequent motion for reconsideration.

III. *Conclusion*

For the reasons set forth above, we will affirm the orders of the District Court.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 3, 2007

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 97-2141

BERNARD J. O'NEILL, et al.

v.

CITY OF PHILADELPHIA, et al.

ORDER

Plaintiffs filed this lawsuit on March 25, 1997, alleging that defendants violated their constitutional rights as a result of searches that occurred at the home of one of the plaintiffs, Bernard O'Neill. On December 12, 2006, I granted summary judgment to defendants on all but two illegal search claims. The two remaining claims in this case stem from two searches of the residence of Bernard O'Neill on May 30, 1995 and June 12, 1995. The searches were conducted by Detectives Robert Ballentine and Gerald Robison, pursuant to a valid arrest warrant for O'Neill's son, Jason, who had committed a triple homicide by arson. Before me now is defendants' Motion for reconsideration of section I.B. 1.b. of that memorandum and order.

Appendix B

"The purpose of a motion for reconsideration is 'to correct manifest errors of law or fact or to present newly discovered evidence.'" *Sonders v. PNC Bank, N.A.*, No. 01-3083, 2003 U.S. Dist. LEXIS 17961, *3 (E.D. Pa. Oct. 9, 2003), *quoting Blue Mountain Mushroom Co. v. Monterey Mushroom, Inc.*, 246 F. Supp. 2d 394, 398 (E.D. Pa. 2002). "In a motion for reconsideration, the burden is on the movant . . . to show 'manifest' errors of law or fact or new evidence." *Egervary v. Rooney*, 80 F. Supp. 2d 491, 506 (E.D. Pa. 2000) (citation omitted).

Before police officers may enter a dwelling to execute an arrest warrant, they must have "a reasonable belief that the arrestee (1) lived in the residence, and (2) is within the residence at the time of entry." *United States v. Veal*, 453 F.3d 164, 167 (3d Cir. 2006) *citing United States v. Gay*, 340 F.3d 1222, 1226 (10th Cir. 2001). Further, the qualified immunity doctrine "provides ample protection to all but the plainly incompetent or those who knowingly violate the law" *Malley v. Briggs*, 475 U.S. 335, 341 (1985). Upon reconsideration, I find that plaintiffs have not offered enough evidence to survive summary judgment on this claim.

Plaintiffs do not dispute that defendants relied on a facially valid arrest warrant which listed Jason's address as 2910 South 61st Street, also the residence of his father. Plaintiffs also do not dispute that the Warrant Service Form and Activity Sheets for both searches stated that detectives had received information that the fugitive was in the area. Further, plaintiffs do not offer

any evidence that defendants Detective Ballentine and Detective Robison fabricated any information regarding Jason's whereabouts. Based on these undisputed facts, I find that defendants Ballentine and Robison acted objectively reasonably when they searched Bernard O'Neill's house.

AND NOW, this 3rd day of January 2007, after considering defendants' motion for reconsideration of section 1.B.1.b. of my Memorandum and Order of December 12, 2006, it is hereby ORDERED that the motion is GRANTED. It is hereby further ORDERED that defendant's motion for summary judgment is GRANTED. Judgment is entered in favor of all defendants and against all plaintiffs. The clerk is ORDERED to close this case statistically.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 3, 2007

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 97-2141

BERNARD J. O'NEILL, et al.

v.

CITY OF PHILADELPHIA, et al.

ORDER

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Appendix C

"The purpose of a motion for reconsideration is 'to correct manifest errors of law or fact or to present newly discovered evidence.'" *Sonders v. PNC Bank, N.A.*, No. 01-3083, 2003 U.S. Dist. LEXIS 17961, *3 (E.D. Pa. Oct. 9, 2003), *quoting Blue Mountain Mushroom Co. v. Monterey Mushroom, Inc.*, 246 F. Supp. 2d 394, 398 (E.D. Pa. 2002). "In a motion for reconsideration, the burden is on the movant . . . to show 'manifest' errors of law or fact or new evidence." *Egervary v. Rooney*, 80 F. Supp. 2d 491, 506 (E.D. Pa. 2000) (citation omitted).

Before police officers may enter a dwelling to execute an arrest warrant, they must have "a reasonable belief that the arrestee (1) lived in the residence, and (2) is within the residence at the time of entry." *United States v. Veal*, 453 F.3d 164, 167 (3d Cir. 2006) *citing United States v. Gay*, 340 F.3d 1222, 1226 (10th Cir. 2001). Further, the qualified immunity doctrine "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1985). Upon reconsideration, I find that plaintiffs have not offered enough evidence to survive summary judgment on this claim.

Plaintiffs do not dispute that defendants relied on a facially valid arrest warrant which listed Jason's address as 2910 South 61st Street, also the residence of his father. Plaintiffs also do not dispute that the Warrant Service Form and Activity Sheets for both searches stated that detectives had received information that the fugitive was in the area. Further, plaintiffs do not offer

any evidence that defendants Detective Ballentine and Detective Robison fabricated any information regarding Jason's whereabouts. Based on these undisputed facts, I find that defendants Ballentine and Robison acted objectively reasonably when they searched Bernard O'Neill's house.

AND NOW, this 3rd day of January 2007, after considering defendants' motion for reconsideration of section I.B.1.b. of my Memorandum and Order of December 12, 2006, it is hereby ORDERED that the motion is GRANTED. It is hereby further ORDERED that defendant's motion for summary judgment is GRANTED. Judgment is entered in favor of all defendants and against all plaintiffs. The clerk is ORDERED to close this case statistically.

s/Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.

APPENDIX D — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED DECEMBER 12, 2006

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 97-2141

December 12, 2006

BERNARD J. O'NEILL, et al.

v.

CITY OF PHILADELPHIA, et al.

MEMORANDUM

O'NEILL, J.

Plaintiffs filed this lawsuit on March 25, 1997 alleging that defendants, the City of Philadelphia, Commissioner Richard Neal, Detective Robert Ballentine, Jr., Detective Gerald Robison, Detective Richard Bova, Detective Robert Morris, and multiple "John Doe" police officers,[1] violated their constitutional

1. Due to unreasonable delay and substantial hardship to the defendants, I denied plaintiffs' motion to amend the complaint to add the names of the individual officers on November 15, 2006, nine years after the complaint was filed and five years after it was removed from suspense.

rights as a result of searches that occurred at the home of the plaintiff Bernard John O'Neill. Before me now is defendants' motion to dismiss, plaintiffs' response, and defendants' reply thereto.

BACKGROUND

This case arose after three searches incident to a valid Warrant of Arrest for Jason O'Neill (a/k/a Jason Raffa), the stepson of one of the plaintiffs in this action, Bernard John O'Neill. Jason committed a triple homicide by arson on March 26, 1995. An arrest warrant was issued on April 27, 1995 based on an Affidavit of Probable Cause provided by Detective Richard Bova of the Philadelphia Police force. The warrant listed Jason's last address as 2910 S. 61st Street in Philadelphia, less than half a mile from the scene of the triple homicide and the address of Bernard O'Neill and his family. After committing the crime, Jason fled to Florida.

Police attempted to execute the arrest warrant at 2910 S. 61st Street on three separate occasions, May 30, 1995, June 12, 1995, and November 23, 1995. Each search occurred in the morning sometime between 6.30 and 7.00 a.m. and, according to the police, was based on reliable information that Jason recently had been seen in the neighborhood. The complaint stems primarily from the third arrest attempt.

That attempt occurred on Thanksgiving morning and there were multiple guests staying in the house.

Appendix D

According to Bernard O'Neill's 911 calls [2] and plaintiffs' statements to internal affairs, defendants used the Stakeout Unit to enter the O'Neill residence. The police officers who entered the residence were wearing black fatigues, black vests, and black helmets and were carrying shotguns. Around eight officers forcibly entered the house, grabbed Bernard O'Neill by the neck, and ordered him to sit on the couch. The officers, with guns drawn, also ordered most of the other occupants of the house downstairs into the living room.

At that point, the officers searched the rest of the house. Officers searching upstairs used flex cuffs to handcuff Chad Brumbaugh, a visitor in the house who resembled Jason. Other officers went to the basement where they confronted Michael Coyle, Bernard and Linda O'Neill's fourteen-year-old son. One of the officers pointed a gun inches from Michael's head and ordered him to roll off his bed. When they began questioning Michael about Jason, Bernard O'Neill yelled downstairs that Michael was only a minor and that police could not question him without a parent being present. Eventually detectives arrived and Brumbaugh was released from his handcuffs. As officers were leaving, one yelled out that they would be back at Christmas.

While the Stakeout Unit was entering the O'Neill residence, Detectives Ballentine and Robison were searching for Jason in Delaware County, Pennsylvania.

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2. Police records show that during the search, Bernard O'Neill made ten 911 calls, from 6:43 a.m. to 8:49 a.m., requesting the presence of a supervisor.

Appendix D

Plaintiffs' original complaint alleged multiple violations of the United States Constitution and the Pennsylvania Constitution and also included Pennsylvania state law claims. In their response to defendants' motion for summary judgment, plaintiffs conceded their §§ 1981, 1985 and 1986 claims, their claims relating to rights under the Fifth, Sixth, Eighth, and Thirteenth Amendments, and their claims under the Pennsylvania Constitution. Plaintiffs do not concede their Fourth Amendment Claims[3] and their state law claims for (1) assault and battery; (2) false imprisonment; and (3) intentional infliction of emotional distress.

In their response, plaintiffs do not offer any facts supporting a finding that Commissioner Richard Neal[4] or Lieutenant Robert Morris,[5] acting under state law,

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3. Plaintiffs' do not have separate Fourteenth Amendment claims; the Fourteenth Amendment incorporates the Fourth Amendment and applies it to the states. *Mapp v. Ohio*, 367 U.S. 643, 655, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

4. Plaintiffs offer no facts to support any claim against Commissioner Neal in his individual capacity. In their response to the motion for summary judgment, plaintiffs do not even mention Commissioner Neal.

5. In his original complaint, Bernard O'Neill also alleges that he was arrested and detained by Lieutenant Morris on December 5, 1995. On that day, Bernard O'Neill met with Lieutenant Morris of the Internal Affairs Department of the Philadelphia Police Department to provide a statement regarding the May, June, and November searches. In their (Cont'd)

deprived plaintiffs of any federal rights or committed any intentional torts against them, so I will grant summary judgment to Neal and Morris on plaintiffs' claims against them.

Defendants also note that discovery closed several years ago and that plaintiffs have taken no depositions of parties or produced any evidence of widespread unconstitutional practices by police officers or produced any evidence that any of the named defendants was present at the November 23 search.

STANDARD OF REVIEW

Rule 56(c) of the Federal Rules of Civil Procedure provides, in relevant part, that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c) (2005). Rule 56(e) provides that when a properly supported motion for summary judgment is made, "an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise

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(Cont'd)
motion, defendants state that Bernard O'Neill was not arrested because he arrived with his attorney and was free to leave at any time. In their response, plaintiffs do not dispute this statement.

provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

Summary judgment will be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The party moving for summary judgment has the burden of demonstrating that there are no genuine issues of material fact. *Id.* at 322-323. If the moving party sustains the burden, the nonmoving party must set forth facts demonstrating the existence of a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). An issue of material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 255. In addition, "the existence of disputed issues of material fact should be ascertained by resolving 'all inferences, doubts and issues of credibility against the moving party.' " *Ely v. Hall's Motor Transit Co.*, 590 F.2d 62, 66 (3d Cir.1978) (quoting *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 878 (3d Cir.1972)).

Appendix D

DISCUSSION

I. Plaintiffs' Federal Law Claims

A. Claims against the City of Philadelphia

Defendants argue that the federal law claims against the City of Philadelphia must fail because plaintiffs have not produced any evidence that the City has a widespread practice of depriving its citizens of the right to be free from unreasonable searches and seizures. I agree. To prevail against the City of Philadelphia for violations of 42 U.S.C. § 1983, plaintiffs must prove that the City "supported the violation of rights alleged." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1480 (3d Cir.1990); *see also Monell v. Dep't of Social Servs.*, 436 U.S. 658, 2036-68, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1977). Section 1983 liability only attaches to a municipality when the injury is inflicted through the execution of the government's policy or custom. *Andrews*, 895 F.2d at 1480. A government policy is made when a policymaking decisionmaker "issues an official proclamation, policy, or edict." *Id.* "A course of conduct is considered to be a 'custom' when, though not authorized by law, 'such practices of state officials [are] so permanent and well settled' as to virtually constitute law." *Id. quoting Monell*, 436 U.S. at 690.

Plaintiffs, in their response, argue that the City had customs of failing to adequately train, supervise, or discipline its police officers in the execution of arrest warrants and use of force and failing to investigate

adequately complaints of excessive force against its police officers. However, plaintiffs have not offered sufficient evidence to prove that the City inflicted their injuries through the execution of a policy or custom.

Plaintiffs' argument relies primarily on *Beck v. City of Pittsburgh*, 89 F.3d 966 (3d Cir.1996). In that case, Robert Beck alleged that Officer Anthony Williams engaged in police brutality and uses excessive force while arresting him and that Pittsburgh's custom of tacitly authorizing such conduct resulted in Beck's injuries and damages. *Id.* at 967. The District Court granted summary judgment, holding that Beck failed to present evidence that the City had a policy or custom that authorized its officers to use excessive force. *Id.* at 970. The Court of Appeals reversed, holding that five separate written excessive force complaints about Williams "were sufficient for a reasonable jury to infer that the Chief of Police of Pittsburgh and his department knew, or should have known, of Officer William's violent behavior in arresting citizens." *Id.* at 973.

In this case, plaintiffs argue that there is a jury question regarding whether the City had an unconstitutional policy or custom of allowing its police officers to use valid arrest warrants as search warrants because of the three allegedly unconstitutional searches of the O'Neill residence. This is not enough. Unlike *Beck*, plaintiffs cite to no evidence that the City knew of, should have known of, or authorized any unconstitutional searches when officers entered the O'Neill residence on

November 23, 2006. Plaintiffs did not complain to the City about the earlier searches. They offer no evidence of other complaints made about unconstitutional searches. Further, plaintiffs also mention no other instances where the City officers used excessive force or used arrest warrants as search warrants. Since plaintiffs have offered no proof of an official policy or custom of tolerating excessive use of force, I will grant summary judgment in favor of the City on this claim.[6]

B. Fourth Amendment Claims Against the Officers in Their Individual Capacities

"[T]o establish *personal* liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right." *Kentucy v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1984). Plaintiffs assert claims against the individual defendants for illegal entry/illegal search, false imprisonment, and excessive force. Defendants argue that: (1) the searches were conducted pursuant to a valid arrest warrant; (2) no officers made false statements in the affidavit in support of probable cause, (3) all the defendants reasonably believed Jason would be found at 2910 S. 61st Street on the dates of the searches; (4) negligence cannot support a § 1983 claim; (5) certain officers did not participate in some of the

6. This grant of summary judgment also includes the claims against the officers in their official capacity. *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1984) (noting that, in suits against officers in their official capacity "the real party in interest is the entity").

searches; (6) there is no evidence that the named defendants used any force against the plaintiffs; and (7) the force used by the officers was constitutionally permissible.

1. Qualified Immunity

"Government officials performing discretionary functions generally are shielded from liability for civil damages." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). This "qualified immunity" applies so long as "their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* The individual defendants assert that they are entitled to qualified immunity. In considering a claim of qualified immunity I must determine (1) whether the actions of the officers violated a constitutional right; and if so, (2) whether the right was clearly established at the time plaintiffs allege that the violations occurred. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

a. Detective Bova

Detective Bova was the lead homicide detective in the investigation of Jason O'Neill. In order to find an individual officer liable under § 1983, plaintiffs must show that "he participated in violating their rights, or that he directed others to violate them, or that he, as the person in charge of the raid, had knowledge of and acquiesced in his subordinates' violations." *Baker v.*

Monroe Twp., 50 F.3d 1186, 1191 (3d Cir.1995). Although plaintiffs argue that there is "no doubt" that Detective Bova was aware of the searches and the use of SWAT to execute them, they offer no specific facts to support their argument. Detective Bova did not participate in any of the searches. The only fact plaintiffs mention in their response is that Detective Bova did not state that "he did not direct the above referenced unconstitutional searches or that he did not have knowledge of or acquiesce in the above referenced unconstitutional searches." Plaintiff offer no evidence of knowledge or acquiescence; thus, they fail to set forth specific facts showing that there is a genuine issue for trial. I will grant summary judgment to Detective Bova on the federal law claims.

b. Illegal Search

i. Violation of a Constitutional Right

Plaintiffs allege that Detectives Ballentine and Robison violated plaintiffs' Fourth Amendment rights by searching the O'Neill residence. Ballentine and Robison participated in the May 30 and June 12 searches, but were searching for Jason in Delaware County during the November search.

Before police officers may enter a dwelling to execute an arrest warrant, they must have "a reasonable belief that the arrestee (1) lived in the residence, and (2) is within the residence at the time of entry." *United States v. Veal*, 453 F.3d 164, 167 (3d Cir.2006) *citing*

United States v. Gay, 240 F.3d 1222, 1226 (10th Cir.2001). The Court of Appeals has directed district courts to "apply a 'common sense approach' and consider 'the facts and the circumstances within the knowledge of the law enforcement agents, when viewed in the totality.' " *Veal*, 453 F.3d at 168 *citing United States v. Magluta*, 44 F.3d 1530, 1535-36 (11th Cir.1995).

Plaintiffs have offered enough evidence to survive summary judgment; there are genuine issues of material fact as to whether Detectives Ballentine and Robison had a reasonable belief that Jason lived at 2910 S. 61st Street and whether Jason could be found at 2910 S. 61st Street on the days of the searches. The warrant did list 2910 S. 61st Street as Jason's address and the police reportedly acted on information that Jason was in the neighborhood. In his affidavit of probable cause for the arrest warrant, however, Detective Bova noted that Jason's last known whereabouts were in Florida. Bernard O'Neill, in his complaint to Internal Affairs, stated that Jason had not lived at 2910 S. 61st Street for three years and that his two previous addresses were on 63rd & Elmwood and Wheeler Street. Jason was not at 2910 S. 61st Street during the first search. Further, the police activity sheet from May 30, 1995 described 2910 S. 61st Street as "the fugitive's father's residence."

ii. Clearly Established

"The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would

be clear to a reasonable officers that his conduct was unlawful in the situation he confronted." *Id.* at 202. The law must put the officer on notice that his behavior was clearly unlawful. *Id.* In this case, there is no doubt that *United States v. Veal, supra,* clearly establishes the general principle that police officers must have a reasonable belief that the arrestee lived in and is within the residence when they enter a dwelling to execute a search warrant. *Cf Saucier,* 533 U.S. at 201. Further, as I discussed above, the officers had significant amounts of information that Jason was (1) not living at 2910 S. 61st St.; and (2) was not present at the time of the searches. Therefore I will not grant summary judgment on this claim.

c. Excessive Force

Plaintiffs also assert a claim against the individual defendants for the use of excessive force. Although "[t]he reasonableness of the use of force is normally an issue for the jury," *Rivas v. City of Passaic,* 365 F.3d 181, 198 (3d Cir.2004), in this case the plaintiffs' have not attributed any acts of force to any of the listed defendants. The excessive force allegations are all directed at the SWAT team, the members of which are not named in the complaint. Therefore, I will grant summary judgment to the defendants on this claim.

d. Conspiracy

In their complaint plaintiffs seem to assert a conspiracy claim against the City and all individual defendants. Once again, however, they did not offer any facts to support this claim, so I will grant summary judgment to the defendants on this claim.

II. State Law Claims

Plaintiffs have alleged three state law intentional tort claims for: (1) assault and battery; (2) false imprisonment; and (3) intentional infliction of emotional distress. Defendants argue that plaintiffs' state law claims against both the City and the individual defendants are barred by the Political Subdivision Tort Claims Act ("PSTCA"), 42 Pa.C.S.A. § 8541 et seq. (2006).

A. City of Philadelphia

The PSTCA limits the liability of local government agencies and their employees, but contains some exceptions. *Id.* §§ 8541, 8542. The PSTCA provides for a limited waiver of immunity by a local agency in only eight narrowly drawn situations: (1) vehicle liability; (2) care, custody and control of personal property; (3) real property; (4) trees, traffic controls and street lighting; (5) utility service facilities; (6) streets; (7) sidewalks; and (8) care, custody and control of animals. *Id.* § 8542; *see also Robey v. Chester County,* 946 F.Supp. 333, 338-39 (E.D.Pa.1996) ("plaintiffs' claims must also fall within one of the eight exceptions listed in § 8542 of the Act").

Plaintiffs do not allege that their injuries were caused in any of those situations. Therefore, I will grant summary judgment to the City on the state law claims.

B. Individual Defendants

There is no immunity, however, for officials who cause injury through "willful misconduct." 42 Pa.C.S.A. § 8550. For police officers, "willful misconduct" is not synonymous with committing an intentional tort. *Renk v. Pittsburgh*, 537 Pa. 68, 641 A.2d 289, 294 (Pa.1994). "Rather, 'willful misconduct' means that a police officer committed an intentional tort subjectively knowing that his or her conduct was wrong." *Walker v. North Wales Borough*, 395 F.Supp.2d 219, 231 (E.D.Pa.2005).

I need not decide whether defendants are entitled to immunity because plaintiffs have not offered any facts to create a genuine issue for trial that any of the individual defendants in this case committed any of the intentional torts. The three torts alleged by the plaintiffs all require intentional conduct. According to plaintiffs' complaint and response to the motion for summary judgment, all the intentional torts seem to arise out of the search of November 23. A problem arises, however, because Detectives Ballentine, Bova, Robison, Lieutenant Morris and Commissioner Neal were not present during the search of November 23. Plaintiffs do not attribute any specific acts to the individual defendants, and therefore I will grant summary judgment to defendants on this claim.

An appropriate Order follows.

Appendix D

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 97-2141

BERNARD J. O'NEILL, et al.

v.

CITY OF PHILADELPHIA, et al.

ORDER

AND NOW, this 12th day of December 2006, after consideration of defendants' motion to dismiss, plaintiffs' response, and defendants' reply thereto, it is hereby ORDERED that defendants' motion is DENIED as to:

1. The Fourth Amendment illegal search claim against Detective Ballentine in his individual capacity; and

2. The Fourth Amendment illegal search claim against Detective Robison in his individual capacity.

Defendants' motion is GRANTED as to all other claims. Judgment is entered in favor of the City of Philadelphia, Commissioner Neal, Lieutenant Morris and Detective Bova and against plaintiffs.

Appendix D

It is further ORDERED that trial is listed for Tuesday, January 10, 2007.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED NOVEMBER 15, 2006

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF PENNSYLVANIA

CIVIL ACTION

NO. 97-2141

BERNARD J. O'NEILL, et al.

v.

CITY OF PHILADELPHIA, et al.

ORDER

Plaintiffs filed this lawsuit on March 25, 1997 alleging that defendants, the City of Philadelphia, multiple named police officers, and multiple "John Doe" police officers, violated their constitutional rights.

On July 25, 1997, plaintiffs filed a motion to amend the complaint by substituting proper names for the "John Doe" police officers. On August 7, 1997, the case was stayed and placed in the civil suspense file. At that time I also denied the plaintiffs' motion without prejudice to its renewal by letter application once the case was removed from suspense. The case was reactivated on December 3, 2001, closed again on March 17, 2003, and reopened on June 25, 2003. The case was

scheduled to go to trial on November 7, 2006. On November 6, 2006, plaintiffs sent me a letter renewing their motion to amend. I will deny their motion.

Rule 15 of the Federal Rules of Civil Procedure provides that after an action has been placed on the trial calendar, "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15 (2006). While leave shall be freely given, it is subject to some limitations. "It is well-settled that prejudice to the non-moving party is the touchstone for the denial of an amendment." *Cornell & Co. v Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d. Cir. 1978).

In this case, allowing plaintiffs to amend their complaint on the eve of trial will result in substantial hardship to defendants. Plaintiffs had nearly five years to amend their complaint after the case was removed from civil suspense and before the trial was scheduled. In preparing for trial, defendants were entitled to rely on plaintiffs' earlier allegations on the matter. *See Cornell & Co.*, 573 F.2d at 824. At this late hour, allowing the amendment will result in not only the addition of multiple defendants and further delay of resolution of the case, but may necessitate a complete change in trial strategy for the current defendants.

Appendix E

AND NOW, this 15th day of November, 2006, it is hereby ORDERED that plaintiff's motion to amend the complaint is DENIED.

s/ Thomas N. O'Neill, Jr.
THOMAS N. O'NEILL, JR., J.